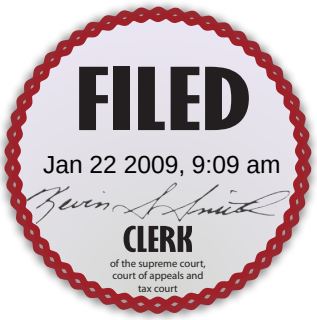

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IN THE
COURT OF APPEALS OF INDIANA

CHERITY WATERS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 79A04-0806-CR-332
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE TIPPECANOE SUPERIOR COURT
The Honorable Thomas Busch, Judge
Cause No. 79D02-0406-FC-31

January 22, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Cherity Waters appeals the sentence imposed by the trial court after her plea of guilty to three counts of forgery, as class C felonies; one count of battery, as a class A misdemeanor; and one count of battery, as a class B misdemeanor.

We affirm.

ISSUES

1. Whether the trial court abused its discretion in its identification and consideration of aggravating and mitigating factors.

2. Whether the sentence imposed is inappropriate.

FACTS

On June 1, 2004, the State charged that in August of 2003, Waters committed nine counts of forgery, as class C felonies, and nine counts of theft, as class D felonies. Two of those forgery counts alleged that on August 20th and 21st of 2003, Waters had written unauthorized checks from her mother's checkbook to PayLess and Wal-Mart in the amounts of $296.77 and $102.44. Waters was released on bond. Subsequently, the State filed a second set of charges against Waters, alleging that after being released on bond for the August 2003 charges, she committed four thefts, as class D felonies, in July of 2004. Further, the State brought a third set of charges, alleging that in January of 2005, also while released on bond, Waters committed two counts of forgery, as class C felonies; two counts of theft, as class D felonies; two counts of check fraud, as class D felonies; and two batteries, as a class A misdemeanor and a class B misdemeanor. The 2005 charges

included the allegations that on January 15, 2005, she uttered a check that she created on a computer in the amount of $733.77 to JC Penney and committed two batteries when she pepper-sprayed two store security guards.

On April 20, 2005, Waters appeared for a guilty plea hearing and presented the trial court with a signed plea agreement as to the three sets of charges. Waters would plead guilty to three counts of forgery, as class C felonies (the August 2003 PayLess and Wal-Mart checks, and the 2005 computer-created check to JC Penney), and the two 2005 pepper-spray batteries (one class A misdemeanor, and one class B misdemeanor); the State would dismiss the numerous other counts; and the trial court could "impose whatever sentences it deems appropriate." (App. 72). In addition, Waters agreed to give a clean-up statement and pass a polygraph examination. At the plea hearing, Waters admitted to facts establishing for her guilty plea. The trial court took the plea under advisement and set sentencing for July 5, 2005.

On July 5, 2005, Waters failed to appear, having fled the jurisdiction. Subsequently, she was arrested in Florida and charged with drug offenses. She pleaded guilty to drug trafficking and manufacturing methamphetamine. While still serving her sentence in Florida, Waters was extradited back to Indiana on the instant matter.

On April 30, 2008, the trial court conducted a hearing at which it accepted Waters' guilty plea and heard evidence – including testimony by Waters – and arguments as to sentencing. It found as aggravating factors Waters' criminal history of theft and check deception; her violation of the terms of her pretrial release; her failure "to cooperate as

promised" in making a truthful clean-up statement; and that Waters had been "in a position of trust" in the circumstances of the first two forgery offenses. (Tr. 30). As mitigating factors, it found Waters' constructive improvement efforts during her Florida incarceration; the hardship of her imprisonment on her children; her expression of remorse; her drug addiction; that Waters "had been a good worker and a good mother in the past"; and that she had experienced "a bad childhood and a bad marriage." (Tr. 30, 30-31). The trial court acknowledged testimony by Waters' mother that she had forgiven Waters, but noted that her mother was "not out any money, the bank is out that money." (Tr. 31).

The trial court found "that the aggravating factors outweigh[ed] the mitigating factors." (Tr. 31). It sentenced Waters to concurrent eight-year sentences on the first two forgery convictions (checks written on her mother's account); an eight-year sentence on the third forgery conviction (computer check to JC Penney), to be served consecutive to the first two concurrent sentences[1]; a concurrent one-year sentence for the class A misdemeanor battery; and a concurrent 180-day sentence for the class B misdemeanor battery. The trial court then ordered Waters to serve twelve of the sixteen years executed and suspended four years to probation.

DECISION

1. Aggravating and Mitigating Factors

[1] Because Waters committed the JC Penney forgery offense after having been arrested for the earlier forgeries, the law provides that "the terms of imprisonment for the crimes shall be served consecutively." Ind. Code § 35-50-1-2(d).

Sentencing decisions are within the trial court's discretion. *McElroy v. State*, 865 N.E.2d 584, 588 (Ind. 2007). We review the trial court's sentencing decision for an abuse of that discretion. *Id.* An abuse of discretion has occurred when the sentencing decision is clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom. *Id.* The trial court has the discretion to deviate from the presumptive sentence[2] upon finding and weighing any aggravating or mitigating circumstances. *Id.* The weight assigned to an aggravating circumstance or a mitigating circumstance is to be determined by the trial court. *Trusley v. State*, 829 N.E.2d 923, 927 (Ind. 2005) (trial court's "obligation to consider what weight to assign a particular aggravator"); *Covington v. State*, 842 N.E.2d 345, 344 (Ind. 2006) ("weight assigned to a mitigator is at trial judge's discretion").

Waters' argument as to the aggravating and mitigating factors is that the trial court did not afford the appropriate weight to the mitigating factors, and it gave improper weight to the aggravating factors – though she does not argue that any of the four aggravating factors found by the trial court are improper. She also argues that the trial court should have found as an additional mitigating factor that her guilty plea spared "the necessity of a trial." Waters' Br. at 12. However, our Supreme Court has held that "a guilty plea may not be significantly mitigating when . . . the defendant receives a substantial benefit in return for the plea." *McElroy*, 865 N.E.2d at 591. In return for pleading guilty to five counts, the State dismissed twenty-five other counts. Hence, we

[2] As the State notes, the presumptive sentencing scheme was in effect at the time Waters committed her offenses.

cannot agree that the "failure to find Ms. Waters' guilty plea as a mitigating factor was error." Waters' Br. at 13.

Waters admits that she had a criminal history. The pre-sentence investigation (PSI)[3] reflects her class A misdemeanor theft conviction in 1995; eight check deception charges in 1998 for which prosecution was withheld pursuant to Waters' performance of certain conditions; another 1998 theft by check deception charge, which was dismissed; and six check deception charges in 2002, wherein she pleaded guilty to one count of check deception -- as a class D felony, but later reduced to a class A misdemeanor. The significance of a criminal history "varies based on the gravity, nature and number of prior offenses as they relate to the current offense." *Bryant v. State*, 841 N.E.2d 1154, 1156-67 (Ind. 2006). The number of Waters' prior offenses and that their nature is so directly related to her instant forgery convictions supports the trial court's giving significant weight to this aggravating factor.

Waters also admits that she "left the jurisdiction of the court pending her sentencing and failed to return." Waters' Br. at 14. The legislature expressly authorized the trial court to consider as an "aggravating circumstance[]" for sentencing the person's

[3] We bring to the attention of Waters' counsel Indiana Appellate rule 9(J), which requires that "documents and information excluded from public access pursuant to Administrative Rule 9(G)(1) shall be filed in accordance with Trial Rule 5(G)." Indiana Administrative Rule 9(G)(1)(b) states that records "excluded from public access" and constituting "confidential" information include "[a]ll pre-sentence reports pursuant to Ind. Code § 35-38-1-13." *Id.* at (viii). Pursuant to Indiana Trial Rule 5(G), when documents are filed in a case but are excluded from public access by Administrative Rule 9(G)(1), they "shall be tendered on light green paper or have a light green coversheet attached to the document, marked 'Not for Public Access' or 'Confidential.'"

violation of "the conditions of . . . pretrial release granted to the person". Ind. Code § 35-58-1-7.1(a)(6). Thus, this aggravating circumstance is proper here.

Waters' plea agreement allowed her to plead guilty to five counts, in return for which the State dismissed twenty-five other counts. Two conditions of the plea agreement were that Waters would provide a clean-up statement and pass a polygraph examination. Waters argues that there is no evidence in the record that she failed to comply with these two terms. The State notes that her flight from Indiana and failure to appear at the sentencing hearing contradict that argument. At sentencing, Waters did not testify that she had given a clean-up statement or that she had passed a polygraph examination. Further, Waters' own letter to the trial court, admitted as an addendum to the PSI, extensively discusses Waters' positive personal efforts; but it is silent as to any compliance on her part with the clean-up and polygraph requirements. Moreover, we note that the PSI reflects that Waters provided no assistance in its preparation. The lack of any participation by Waters in the compilation of the PSI and her absconding to Florida support the inference that Waters failed to honor her part of the agreement to provide a clean-up statement and pass a polygraph examination.

The record supports the trial court's finding of significant aggravating factors. Waters provides no authority to indicate that the law requires great weight be given to those mitigating factors found by the trial court, and our Supreme Court has declared that "the trial court determines the weight assigned to mitigating circumstances." *McElroy*,

865 N.E.2d at 592. We do not find that the trial court abused its discretion in its identification and consideration of the respective factors.

2. Inappropriate Sentence

Waters also argues that her sentence is inappropriate. Her argument in this regard is that "the total dollar loss amount was less than $1150.00"; and that her lack of a felony criminal record; expression of remorse; "long standing drug abuse," "bad marriage and childhood"; "taking advantage of rehabilitation programs" in Florida; and "spar[ing] the State the expense of trial" are factors that "prove" her sentence is "inappropriate." Waters' Br. at 16. We are not persuaded.

The Indiana Constitution authorizes independent appellate review and revision of a sentence, authority implemented through Appellate Rule 7(B). *Anglemyer v. State*, 868 N.E.2d, 490, 491, *clarified on reh'g on other grounds*, 875 N.E.2d 218 (Ind. 2007). The Rule provides that a court "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." *Id.* (quoting Ind. Appellate Rule 7(B)). "The burden is on the defendant to persuade" the appellate court that his or her sentence is inappropriate. *Reid v. State*, 876 N.E.2d 1114, 1116 (Ind. 2007) (citing *Childress v. State*, 848 N.E.2d 1073 (Ind. 2006)).

Waters had a substantial history of acting unlawfully with respect to the property of others. Entrusted with her mother's checkbook during her mother's absence, she committed forgery by writing unauthorized checks. Further, after being charged with the

forgeries of checks on her mother's account, and while on pretrial release, Waters' actions resulted in two additional sets of criminal charges being brought against her. After entering into a plea agreement whereby she would plead guilty to five counts in exchange for the dismissal of twenty-five other counts, Waters fled and failed to appear for further proceedings. Moreover, she committed additional crimes and was convicted in another state after fleeing Indiana. Waters despairs of the hardship imposed on her children by her incarceration; yet, Waters fails to acknowledge that she abandoned her children when she fled Indiana.

Waters has not met her burden of persuading us that the sixteen year sentence, with twelve years executed and four years of probation, is inappropriate in light of the nature of the offenses and her character.

Affirmed.

RILEY, J., and VAIDIK, J., concur.